Snap-On Tools, Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW. Cases 10–CA–33020, 10–CA–33096, and 10–RC–15186

June , 2004

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On April 22, 2002, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party and the General Counsel filed cross-exceptions and supporting briefs, and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified below.[3]

This combined representation and unfair labor practice case arises in the context of an organizational campaign conducted in a bargaining unit of production and maintenance employees at the Elizabethton, Tennessee, manufacturing facility of Snap-On Tools, Inc. (the Respondent). The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO (the Union) lost the election. The judge found that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by videotaping employees' handbilling at the plant gate, and by granting benefits and announcing a contemplated change in retiree benefits. The judge further found that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing a final warning to employee David Markland. The judge dismissed complaint allegations that the Respondent violated Section 8(a)(1) by directing employees Markland and Herb Smith not to discuss Markland's altercation with employee Wanda Burrow and by creating the impression that union activities would inevitably lead to strike violence. The judge also found that the Respondent engaged in objectionable conduct affecting the election.[4] Accordingly, he recommended that the election be set aside and that a new election be held.

As set forth below, we reverse the judge and find that (1) the Respondent violated Section 8(a)(1) by creating the impression that union activities would inevitably lead to strike violence, (2) the Respondent did not engage in objectionable conduct through employee Shouse's alleged list keeping, and (3) the Respondent did not violate Section 8(a)(3) and (1) by issuing a final warning to employee Markland. We adopt the judge's decision in all other material respects.[5]

[1] No exceptions were filed to the judge's dismissals of (1) allegations that the Respondent granted a benefit by sending letters to nonnetwork physicians assuring them of payment, processing claims for employees whose physicians refused to do so, and reimbursing $15 for ophthalmologist examinations; (2) the aspect of Objection 1 concerning the assignment of David Shouse to duties other than his normal duties; (3) Objection 2 alleging that Shouse engaged in electioneering when he entered into the voting area with a disabled employee; (4) Objection 5 alleging the publication of threats of violence directed at supervisors by nonemployee union members; (6) the aspect of Objection 7 concerning the Respondent's payment of benefits pursuant to its prepetition announcement; and (7) Objection 9 alleging the singling out of employee Warren Taylor by posting a message on an electronic bulletin board concerning the return of union cards.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] As the Union has excepted to the judge's failure to order that the notice of the new election include, pursuant *to Lufkin Rule Co.*, 147 NLRB 341 (1964), a statement of the reason for the election being set aside, we order that such language be included in the notice of the new election. *Fieldcrest Cannon, Inc.*, 327 NLRB 109, 110 fn. 3 (1998); see NLRB Casehandling Manual (Part Two), Representation Proceedings, Sec. 11452.3.

The Union has also excepted to the judge's failure to include special notice and access remedies and to award the Union its organizing expenses. We find that these remedies are not warranted in this case.

[4] The judge sustained election objections that were coextensive with the unfair labor practices he found: announcement of retiree benefits (Objection 7 and/or Objection 13) and surveillance (Objection 11). He also found that the Respondent interfered with the election by falsely attributing potential violence to a statement made by employee Harold Sheppard (Objection 4), by predicting a 1-week strike if employees selected the Union (Objection 4), and by engaging in list keeping (Objection 1). As stated below, we adopt these findings, except for the finding that the Respondent engaged in list keeping.

[5] In so doing, however, we find it unnecessary to pass on the election objections that the judge recommended be dismissed (Objections 3, 8, 10, 12, and part of Objection 7).

Further, we agree with the judge's finding that the Respondent violated Sec. 8(a)(1) by changing its normal practice of panning the parking lot with a surveillance camera to pointing the camera at the plant gate where employees were handbilling. Security guard Polly Grindstaff, an admitted agent of the Respondent, testified that before handbilling began, the surveillance camera normally panned back and forth during shift changes. She said she normally switched the camera into panning mode "about a half hour before shift change." However, the record establishes that once handbilling began, the camera remained fixed on the handbillers. Ron Hendrix, an international union representative, testified that when employees were present handbilling, "90

1. The General Counsel has excepted to the judge's dismissal of the complaint allegation that the Respondent created the impression that employee union activities would inevitably lead to strike violence. We find merit in this exception.

The General Counsel's evidence concerning this allegation was contained in a booklet entitled, "It's Time to Vote No," which the Respondent distributed within the week before the election. The booklet stated in part:

> Some employees have said that if there is a strike at Snap-On, they would cross the picket line and come to work. *But don't be too quick to ignore the reality of how difficult crossing the picket line might be.* After all, a Union strike is not successful if people "break rank" and fail to honor a picket line. Indeed, one Union supporter at Snap-on who claims to have been a UAW member for 17 years in Detroit recently spoke of using a high-powered rifle to shoot anyone who crossed the picket line as well as a Judge! [Emphasis in original.]

This example resulted from an alleged conversation between security guard Grindstaff, and employee Sheppard. Grindstaff stated that she told Sheppard that if there was a strike, 1500 people would be lining up for jobs, and that he replied, "Not if somebody was over there in that field with a high-powered rifle and shot the first son of a bitch that crossed the line, and then went down there and shot the Judge that issued the order." Grindstaff furnished the Respondent a written statement in which she stated that Sheppard said, "Someone should be over in the field with a high-powered rifle & shoot everyone who comes through the gate, starting with the judge who wouldn't let them stop people from crossing a picket line."

Sheppard denied having this conversation with Grindstaff, but acknowledged that in conversation with other employees, he had spoken of an incident involving a United Mine Workers strike in which people got shot and a judge was injured.[6] Sheppard explained that the Respondent's statement referred to him because he was "the only one who had worked at Chrysler." Although Sheppard asked the Respondent to retract the statement, the Respondent refused to do so on the ground that "there were no names mentioned."

The Board has held that an employer violated Section 8(a)(1) of the Act by stating that bomb threats and vandalism occur when "outsiders" get involved, where there was a complete lack of evidence as to who was responsible for the bomb threats and vandalism. The Board held that the employer blamed the union and was in effect "telling the employees if you don't want vandalism and bomb threats (and who would) then get rid of the Union." *CDR Manufacturing*, 324 NLRB 786, 790 (1997).

[6] The judge did not decide whether there was, in fact, a conversation between Grindstaff and Sheppard.

percent of the time" the camera would be pointed at the gate where they were handbilling. Employee John Large testified that before the handbilling, "the camera did a sweeping motion from one side of the parking lot to the other side, and then back," but that "the camera stayed on us when we were handbilling." "The well-established rule is that absent proper justification, photographing or videotaping employees as they engage in protected concerted activity violates Section 8(a)(1) of the Act." *Robert Orr-Sysco Food Services*, 334 NLRB 977 (2001). The Respondent contends that the change in the videotaping was in response to and was justified by legitimate safety concerns. The record fails to support this claim. Grindstaff—who was responsible for changing the operation of the camera—testified that no one in Snap-On management ever requested that she utilize the security camera in any particular manner and that she had discretion in utilizing the camera. She also testified that no handbillers or other union supporters had told her that people were driving unsafely when coming through the gate. There is no indication in the record that the employee and management testimony cited by our colleague concerning reports of employees' driving too quickly were relayed to Grindstaff. Accordingly, safety concerns could not have been the true reason Grindstaff changed the operation of the camera. Under these circumstances, we agree with the judge that the Respondent engaged in unlawful surveillance when it altered its normal practice and pointed its camera at the gate where its employees were engaged in protected activity.

We also agree with the judge's finding that the Respondent engaged in objectionable conduct when, 8 days before the election, it posted a memo entitled, "Employee Strike Costs." This memo listed strikes at the Respondent's other facilities, the duration of the strike, and the cost to employees. The last item was the following:

2001 Elizabethton 1 week $936.00

The memo was posted throughout the plant. Several hours later, it was taken down. When it was reposted, it omitted the duration of any potential strike at Elizabethton, and the cost was revised to $842.00. The judge found that the Respondent's memo was objectionable because it predicted, without qualification and without factual basis, that there would be a 1-week strike if the employees selected the Union. The judge further found that the reposted document did not repudiate the objectionable language. We agree with the judge that the Respondent engaged in objectionable conduct in this regard.

Member Schaumber would not find that the Respondent predicted a 1-week strike if the employees selected the Union, thereby interfering with employee free choice. Eight days before the election, the Respondent posted a memo entitled "Employee Strike Costs" that listed the facilities at which strikes had occurred. The list included the Respondent's Elizabethton facility with notations of "2001," "1 week," and "$936.00." Member Schaumber does not find this entry constitutes a prediction of a 1-week strike if employees selected the Union. Rather, in his view, the entry was merely an estimate of how much a strike at Elizabethton was likely to cost if one occurred. Therefore, contrary to his colleagues, Member Schaumber would not adopt the judge's finding that the Respondent's posting of the list constituted objectionable conduct.

See also *Kawasaki Motors Corp., U.S.A.*, 257 NLRB 502, 510–511 (1981), enfd. mem. 691 F.2d 507 (9th Cir. 1982), cert. denied 459 U.S. 1202 (1983) (employer that "reasonably conveyed the thought that the Union was responsible for making bomb threats" violated Section 8(a)(1) of the Act because "no evidence of linkage between such threats and the Union" was ever advanced).

The Respondent's statements are similar to those found unlawful in *CDR Manufacturing* and *Kawasaki*, and likewise lack evidentiary support. Here, there was no evidence that the Union made the threat of strike violence. Most significantly, the only report the Respondent had regarding Sheppard's purported remark referred to "someone" being in a field with a rifle. As Grindstaff admitted, Sheppard never made any statement even remotely suggesting that *he* would shoot anyone. Further, the Respondent refused Sheppard's request that it retract the statement. When the Respondent, in the absence of any reasonable basis, stated that a current employee (referring unmistakably to Sheppard) had spoken of using a high-powered rifle to shoot anyone who crossed the picket line, the Respondent, as did the employers in *CDR Manufacturing* and *Kawasaki*, created fear among its employees that would reasonably tend to discourage them from engaging in union activities. Accordingly, we find that the Respondent violated Section 8(a)(1) in this regard.[7]

2. The Respondent excepts to the judge's findings that employee Shouse was an agent of the Respondent and that he engaged in objectionable list keeping. We find merit in these exceptions.

During the morning voting session, Shouse was in a position from which he could observe employees as they returned to work after voting. Shouse was standing next to the Respondent's attorney. Several employees testified that it looked like Shouse was watching employees as they left the voting area and that it looked like Shouse was writing something down.

The Board applies common law principles when examining whether an employee is an apparent agent of an employer. The test is whether, "under all the circumstances, 'the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.'" *Waterbed World*, 286 NLRB 425, 426–427 (1987) (citations omitted). "The burden of proving any type of agency rests with the party asserting that relationship," i.e., the Charging Party/Petitioner in the instant case. *Millard Processing Services, Inc.*, 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994). In this case, the judge's conclusion that Shouse was the Respondent's agent was based solely on the ground that it was "undisputed that Shouse was present with the [Respondent's attorney] at various times." The fact that Shouse, an hourly employee who had been selected by the Respondent to serve as a substitute observer, was seen standing near the Respondent's attorney, without any other evidence of agency status, is insufficient to satisfy the Charging Party/Petitioner's burden. Accordingly, we reverse the judge's agency finding.

We also reverse the judge's determination that Shouse engaged in list keeping. As discussed above, the evidence shows that Shouse could observe employees as they returned to the plant after they voted, that Shouse stated the names of several employees after they had voted, and that he appeared to be writing something down. From this, the judge inferred that Shouse was keeping a list of persons who had voted. This inference is not supported by the record as a whole. No one actually testified to having seen a list of any kind. Employee Timothy Timbs testified that it looked like Shouse was writing something, but Timbs also stated that he "could not see" what Shouse was actually doing. Employee Roy Ward stated that he believed that Shouse spoke either "yes" or "no" after he and another employee had voted and that "it looked like . . . they were marking something." Ward did not further describe the "something." The judge himself admitted that "no employee who observed Shouse or heard his name being spoken saw a list." Considered as a whole, we find that this testimony is insufficient to support the inference of list keeping

[7] In recommending that this allegation be dismissed, the judge relied on *Hampton Inn*, 309 NLRB 942, 943 (1992). That case is distinguishable. In *Hampton Inn*, the employer posted a notice entitled, "*WHAT CAN THE UFCW GIVE YOU?*" The notice included the following statements: "[t]he *right to throw* brickbats at cars of nonstrikers—even if they are your friends," and "[t]he *right to fear* for your safety and the safety of your loved ones if you oppose United Food and Commercial Workers Union strikes." (Emphasis in original.) These statements were general references to possible strike violence, which were not attributed to any individual. The Board found that the statements were not threats of strike violence and were, instead, expressions of "opinion as to one possibility of what might happen should the Union win." Id. at 943. In contrast, the threat here was specific—shooting those who crossed a picket line—and was attributed to a Snap-On employee. Further, the Respondent had no reasonable basis for believing that a Snap-On employee would take the action threatened.

Chairman Battista concurs in the result. However, in doing so, he notes that, unlike *CDR Manufacturing* and *Kawasaki*, the Respondent here did not say that *the Union* would cause violence. In the instant case, the Respondent predicted that *a union member* would resort to violence. However, even the more limited prediction was not based on fact. It was based on a union member's statement that "somebody" could resort to violence. Thus, the Respondent's prediction was without factual basis. In these circumstances, Chairman Battista joins his colleagues in finding a violation.

made by the judge. Accordingly, we reverse the judge and overrule this objection.[8]

3. The Respondent excepts to the judge's finding that it violated Section 8(a)(3) of the Act by issuing a warning to employee Markland for "giving false replies or testimony to the company." The General Counsel and the Union except to the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) of the Act when it prohibited Markland and employee Smith from discussing a workplace altercation that Markland had with coworker Burrow. We find no merit to either allegation.

The facts surrounding Markland's altercation with Burrow, the Respondent's direction not to talk about it, and the Respondent's warning to Markland are set out in detail in the judge's decision. On May 16, 2001,[9] Markland, in the course of processing an order, realized that there was no storage number on a routing slip that Burrow had given him. Markland went to the dispatch office, which was a cubicle with a sliding glass window, and slid the window open. When Burrow approached the window, Markland held up the routing slip and said that there was no storage number on it. Then, according to Markland, Burrow reached through the window and slapped him on his cheek. He stepped back and asked her why she did that. He then walked away, and Burrow followed, attempting to apologize.

According to Burrow, she reached through the window and patted Markland's face, telling him that she would find the order. She said she attempted to touch him again, to "take it back," but he turned and left. She then apologized.

Markland reported the incident to supervisor Tony Irick, Human Resources Manager Chamberlain, and General Supervisor Larry Cooper. He said that Burrow's slap was an emotional shock and that he was too upset to work. He requested and was granted a gate pass to go home. Later that day, Markland swore out a warrant against Burrow for assault, which he later withdrew on advice of his counsel.

Chamberlain interviewed Burrow as well as employees McFarland and Shouse, who Markland claimed were present when Burrow allegedly slapped him. Burrow admitted only to playfully tapping Markland on the cheek. Neither McFarland nor Shouse reported any physical contact with Markland. The following day, Chamberlain and Cooper told Markland that they felt he was "blowing things out of proportion," that he had not been slapped, that they had seen no signs of physical contact, and that he was creating a hostile work environment for Burrow by talking about the incident on the shop floor.

Later that day or the next, Plant Manager Gary Oldenburg came to Markland's workstation and told him that he could not speak for Burrow but that, on behalf of the Respondent, he was sorry the incident had happened. According to Markland, Oldenburg additionally stated that Burrow had a "reputation" and that he had seen her "kind of slap around and hit on people as a gesture of expression." Oldenburg demonstrated by patting Markland's shoulder.

Markland then returned to Chamberlain and Cooper and told them that Oldenburg had said that he had seen Burrow slap and hit people. Oldenburg, who was then asked to join the impromptu meeting, claimed that Markland misquoted him—that he merely had said that he had seen Burrow "touch people." Markland disputed Oldenburg's denial. Markland was again told that he was blowing things out of proportion, to "drop it and let it go," and not to talk to anyone on the floor about the incident, as he was creating a hostile environment on the floor.

Several days later, on May 22, Markland was called into the office, and after requesting a witness, was joined by employee Smith. Markland was presented with a final written warning for the "major offense" of "giving false replies or testimony." The warning set forth a chronology of events beginning with Markland's altercation with Burrow. It noted that, although Markland had reported that Burrow had slapped him hard, neither supervisor Irick, to whom he had first reported the slap, nor Chamberlain or Cooper had seen a red mark or any other evidence of a slap to Markland's face, and that neither witness who Markland identified (apparently McFarland and Shouse) had seen any physical contact or heard the sound of a slap. The warning further recounted Markland's claim that Plant Manager Oldenburg had told him that Oldenburg had seen Burrow hit people previously but that Oldenburg had denied this statement and had said that he had told Markland merely that he had seen Burrow pat someone as a friendly gesture. The warning then noted that Markland had responded by asserting that Oldenburg was not being truthful. The warning stated that Markland "in effect . . . called the plant manager a liar." The warning further stated:

> In summary our investigation shows that you have written and verbalized false statements about your con-

[8] Member Walsh finds it unnecessary to pass on the judge's findings that Shouse was the Respondent's agent and that he engaged in objectionable list keeping. The Respondent's critical-period surveillance, announcement of benefits, and threats of strikes and violence interfered with the employees' free choice of representative and are sufficient grounds upon which to order a new election. Accordingly, he finds no need to pass on the list-keeping objection.

[9] All dates hereafter are 2001.

> versation with Plant Manager Gary Oldenburg and you have directly accused him of lying. The unfounded allegations that you have made against Wanda Burrow have created a great deal of stress for both her and her husband, Eddie Burrow, and have also created a great deal of unrest among the employee population.

The warning concluded by stating that it was a final written warning and that further activities of this nature would result in discipline up to and including termination. Markland and Smith were both directed not to speak about the incident.

We find, contrary to the judge, that the Respondent's warning to Markland did not violate Section 8(a)(3). Under the test set out in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to establish the violation, the General Counsel must show by a preponderance of the evidence that Markland's protected activity was a motivating factor in the Respondent's decision to issue the warning. Thus, the General Counsel must show that Markland engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent demonstrated antiunion animus. Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

The judge found that Markland was a known union supporter. During the campaign leading up to the March 21 election, Markland wore a union shirt for a short period of time and then began wearing union buttons. Thus, it is undisputed that the Respondent was aware of Markland's support for the Union.

We find, however, that the General Counsel failed to show that antiunion animus was a motivating factor in the Respondent's issuance of the warning to Markland. While Markland engaged in union activity during the campaign leading up to the March 21 election, the warning was not issued to Markland until May 22, two full months after the election was held. Thus, the warning was remote in time from Markland's union activity and proximate to the events for which Markland was purportedly disciplined. Thus, the Respondent warned Markland shortly after: Markland's claim—which the Respondent's investigation found unsupported—that Burrow had slapped him; Markland's persistent protestations concerning this event; the disruption that this issue caused among employees; and Markland's further statement, which the Respondent found to be false, that Plant Manager Oldenburg had told Markland that he had seen Burrow hit other people.

Nor do we find that the 8(a)(1) conduct that the Respondent engaged in prior to the election warrants a contrary result. Those violations were not directed at Markland, involved wholly unrelated conduct, were remote in time from Markland's discipline, and the warning was directed solely at Markland's subsequent behavior, which was wholly unrelated to union activity.

Moreover, contrary to our dissenting colleague, we do not find that the Respondent treated Markland in a disparate manner. The Respondent did not discipline either Markland or Burrow for their altercation. Rather, the Respondent disciplined Markland for his subsequent conduct of making unfounded allegations against Burrow and making false statements about his conversation with Oldenburg. Therefore, contrary to our dissenting colleague, the fact that the Respondent did not also discipline Burrow does not show that the Respondent's discipline of Markland constituted disparate treatment. Further, while, as our colleague notes, there is no indication in the record that the Respondent had disciplined any employee other than Markland for disputing what a superior had said, the crux of the conduct for which the Respondent disciplined Markland was his making unfounded or false statements. While it may be that no employee had previously engaged in precisely the same type of misconduct as Markland did, the Respondent was not thereby precluded from validly disciplining Markland for such misconduct.

Our colleague also suggests that the Respondent was concerned about getting Markland to drop his complaints about Burrow so as not to create a hostile work environment for Burrow (who had expressed her opposition to the Union), and the Respondent was not similarly concerned about creating a hostile work environment for Markland (a Union supporter). Our colleague's suggestion has no merit. The Respondent was concerned about a hostile work environment for Burrow because she was the one accused of slapping people. The reason why there was no similar concern about Markland was that he was the accuser, not the accused. The fact that Burrow was against the Union, and Markland was for the Union, was irrelevant.

In these circumstances, we find that the General Counsel has failed to show that the warning was motivated by antiunion animus. Accordingly, we dismiss the complaint allegation that the Respondent's issuance of the warning violated Section 8(a)(3). Even if we were to find, which we do not, that the General Counsel established his required initial showing under *Wright Line*, we would find that the Respondent has succeeded in demonstrating that

it would have taken the same action against Markland even in the absence of his protected union activity.[10]

We agree with the judge that the Respondent's direction to Markland and Smith not to discuss the altercation did not violate Section 8(a)(1). The incident between Markland and Burrow was a private, one-on-one altercation, unrelated to any term or condition of employment. Furthermore, as the judge pointed out, the prohibition imposed by the Respondent was limited to the discussion of the altercation between Markland and Burrow. By its own terms, the prohibition did not apply to the discipline imposed on Markland or any other matter affecting terms and conditions of employment. Finally, Markland's own testimony reveals that when he spoke of the incident to coworkers, he "just told them that [he] got slapped and that was it." Thus, Markland's conversations with other employees were limited to the altercation, which, as stated above, was unrelated to a term or condition of employment. Accordingly, inasmuch as the record fails to show any nexus or link between the Respondent's directive and activity protected by the Act, we affirm the judge's dismissal of this allegation.[11]

[10] Member Walsh agrees with the judge, for the reasons stated by him, that the General Counsel established that Markland's union activity was a motivating factor in the Respondent's decision to issue the final warning to Markland. The warning was not, as his colleagues maintain, "remote in time" from Markland's support for the Union in the election, particularly in light of the fact that the representation matter was still pending at the time the warning was issued. Further, the Respondent displayed its unlawful motivation, not only by its 8(a)(1) conduct around the time of the election, but also by treating Markland in a disparate manner. Thus, the Respondent was concerned only with getting Markland to drop his complaints about Burrow so as not to create a hostile work environment for Burrow, who had expressed her opposition to the Union. There is no indication in the record that Burrow—who admittedly touched Markland without his consent—was warned about creating a hostile work environment for Markland, who was concededly known to be a union supporter. There is also no indication in the record that any other employee had ever been disciplined for disputing what a superior had said. In these circumstances, the judge properly found that the General Counsel met his initial burden under *Wright Line* and that the Respondent failed to establish that it would have taken the same action against Markland in the absence of his union activity.

[11] Member Walsh finds that the Respondent violated Sec. 8(a)(1) when it instructed Markland and Smith not to discuss this altercation. Even assuming that the altercation itself did not involve a term or condition of employment, the restriction the Respondent placed on Markland and Smith regarding the incident would reasonably be construed by them as encompassing the Respondent's actions taken as a result of the altercation. These actions—discipline against Markland, but not against Burrow—undoubtedly related to terms and conditions of employment. As such, the prohibition on discussing the altercation would necessarily interfere with the employees' right to act in concert regarding terms and conditions of employment and is in violation of Sec. 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Snap-On Tools, Inc., Elizabethton, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

"(c) In the absence of any reasonable basis, creating the impression that employee union activities will inevitably lead to strike violence."

2. Delete paragraph 2(a) and reletter the subsequent paragraphs.

3. Substitute the attached notice for that of the administrative law judge.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the

Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. June , 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT engage in surveillance of your activities on behalf of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, or any other labor union.

WE WILL NOT grant benefits or announce retiree benefits to you in an effort to discourage you from supporting the Union.

WE WILL NOT, in the absence of any reasonable basis, create the impression that employee union activities will inevitably lead to strike violence.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

SNAP-ON TOOLS, INC.

Sally R. Cline, Esq., for the General Counsel.
Stephen M. Darden and *Christopher D. Owens, Esqs.*, for the Respondent.
Lesley A. Troope, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Elizabethton, Tennessee, on February 11 through 14, 2002,[1] pursuant to a consolidated complaint that issued on September 28.[2] The complaint, as amended, alleges various violations of Section 8(a)(1) of the Act and the discriminatory warning of employee David Markland in violation of Section 8(a)(1) and (3) of the Act.[3] In the same document, the Regional Director, having issued an Order Directing Hearing on Challenged Ballots and Objections in Case 10–RC–15186, consolidated that case for hearing with the unfair labor practice cases. The Respondent's answer denies all violations of the Act. I find, with certain exceptions, that the Respondent did violate the Act as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Snap-On Tools, Inc., (the Company), is a Wisconsin corporation engaged in the business of manufacturing hand tools at various locations including its plant at Elizabethton, Tennessee, from which it annually sells and ships products valued in excess of $50,000 directly to customers located outside the State of Tennessee. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 2001 unless otherwise indicated.

[2] The charge in Case 10–CA–33020 was filed on April 19 and the charge in Case 10–CA–33096 was filed on June 4.

[3] The misspelling of Markland as "Mackland" in portions of the transcript is corrected.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Elizabethton Snap-On plant operates three shifts and employs over 200 employees. The Plant Manager is Gary Oldenberg. The Union began organizational activity in January 2001. Plant Manager Oldenberg, in a letter to employees dated January 30, acknowledged that he was aware of the union activity.

The petition for an election in Case 10–RC–15186 was filed on February 7. A Stipulated Election Agreement was approved on February 21. The election was held on March 21. The tally of ballots reflected that the Union received 100 votes whereas 107 employees voted for no representation. There were 10 challenged ballots. Following the opening of the hearing all parties, without acknowledging the eligibility or ineligibility of any challenged voter and without waiving their right to challenge the same voters in any future election, agreed to waive all challenges and open the 10 challenged ballots. The revised tally reveled that the Union received 107 votes and that 110 employees voted for no representation.

The complaint alleges that, prior to the election, the Company engaged in surveillance, granted benefits to employees and announced benefits to retirees in order to discourage employees from supporting the Union, and created the impression that union activities would invariably lead to strike violence. Following the election, the complaint alleges that the Respondent issued a discriminatory warning to employee David Markland and directed employees not to speak to other employees about an altercation on the plant floor in order to prevent employees from engaging in protected concerted activity.

The Union filed objections to the election, several of which are coextensive with the preelection complaint allegations. This decision shall first address the complaint allegations and then the objections to the election that are not coextensive with any complaint allegation.

B. The Complaint Allegations

1. Surveillance

The complaint alleges that the Respondent engaged in surveillance by videotaping employees' union handbilling at the plant gate. The facts relating to this allegation are not in significant dispute. The Company has, for a number of years, operated surveillance cameras. One of these cameras observes the gate that is the entrance to the employee parking lot. Polly Grindstaff is an employee of a security agency named Guardsmark who is assigned to, and is an admitted agent of, Snap-On. Grindstaff acknowledged that, prior to the handbilling that began on January 29, it was normal for the surveillance camera to pan back and forth during shift changes. Her normal procedure was to switch the camera into panning mode "about a half hour before shift change." The camera would begin to videotape at that time and throughout the panning process. In the course of each pan, the camera would pick up the gate upon which it was pointed at all times other than at shift change. Grindstaff explained that the camera would pan the parking lot during shift changes to monitor employee conduct such as dropping bubble gum on the hoods of cars in hot weather, recording accidents for which there "might need [to be] a record," or catching "employees coming in late or something like that."

Ron Hendrix, an International Representative of the Union, was in charge of the organizational campaign at Elizabethton. He testified that, when employees were present handbilling, "90 percent of the time" the camera would be pointed at the gate where they were handbilling and that employees would comment, "we're on Candid Camera." Hendrix observed that some potential recipients of union handbills, "if they were right there where the cameras would see them, they wouldn't take handbills." He explained that, when the cars were lined up before the gates opened, they were out of camera range and that "some of those employees would take it [union literature] if they were lined up in that line … [b]ut they wouldn't if they … were pulling in. They would just drive right by us."

The Board, in *Robert Orr-Sysco Food Systems*, 334 NLRB 977 (2001) summarized precedent relating to interference with organizational activity involving surveillance cameras.

> The well-established rule is that absent proper justification, photographing or videotaping employees as they engage in protected concerted activity violates Section 8(a)(1) of the Act. *F. W. Woolworth Co.*, 310 NLRB 1197, 1197 (1993); *Saia Motor Freight Line, Inc.*, 333 NLRB 784 (2001). It also constitutes objectionable conduct, *Mercy General Hospital*, 334 NLRB 100, 104–105 (2001), and warrants direction of a new election unless the impact on election results is de minimis, [I]d. at 8. These rules apply not only where a videotape is shot with a handheld camera, but also where, as here, the videotape is created with a rotatable security camera purposefully directed at protected concerted activity. See, e.g., *Mercy General Hospital*, supra; *U.S. Ecology Corp.*, 331 NLRB 223, 235 (2000); *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1269 (1997), enfd. in relevant part 176 F.3d 1310 (11th Cir. 1999); *Frontier Hotel & Casino*, 323 NLRB 815, 837 (1997), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). At the same time, however, the Board "recognize[s] that an employer has the right to maintain security measures necessary to the furtherance of legitimate business interests during the course of union activity." *National Steel & Shipbuilding Co.*, 324 NLRB 499, 501 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998). Thus, it is neither unlawful nor objectionable when a rotatable security camera, operating in its customary manner, happens to record protected concerted activity on videotape. Cf. *Mercy General Hospital*, supra, slip op. at 6 (finding no justification for videotaping where direction security camera was pointing "did not result from the established way in which the camera was operating"); *Frontier Hotel & Casino*, supra at 837 (finding no justification for videotaping where security camera focused on union activity and did not rotate to scan parking lot "as was customarily the case"). Id at slip op. 1–2.

Grindstaff, who made known to employees her opposition to the Union, admitted that when employees were handbilling she "watched the gate to make sure no unauthorized people came

on the property" and utilized the camera for that "sometimes." She did not contradict the testimony of Hendrix that the camera was pointed towards employees handbilling at the gate 90 percent of the time. Grindstaff admitted that there were no incidents of trespass or violence, nor did she receive any reports of improper driving. Grindstaff's testimony that the normal procedure was for the camera to pan back and forth during shift change confirms that, when employees were handbilling, she, an admitted agent of the Respondent, altered the normal procedure regarding the surveillance camera. The Respondent's argument regarding known union adherents publicly handbilling being able to be observed is not the issue. The Board made clear in *Mercy General Hospital*, supra at 105, the substantive difference between being "merely observed" and being photographed. That the gate would have incidentally been videotaped for a portion of every scan does not validate the Respondent's position. The continuous observation of handbilling prevented employees who desired to receive union literature anonymously from doing so. Consistent with Board precedent, I find that the alteration of the Respondent's normal practice of panning the parking lot with a surveillance camera that was taping during shift change by pointing that camera at the gate where employees were engaged in protected Section 7 activity violated Section 8(a)(1) of the Act.

2. Grant of benefits to employees

The Company is self-insured but contracts the administration of its employee health insurance. On September 11, the Company advised all employees by letter that the Company was changing the insurance company that administered its health insurance program from a company identified as Harrington to Aetna. Employees were also advised that their deductible was being increased and that the weekly employee contribution for medical benefits was being increased. These same changes were confirmed to employees at a meeting held in September or October. At that meeting, employee Franklin Coleman recalled that Plant Manager Oldenberg stated that "he did not expect anybody to like it, but neither he nor anyone else could do anything about it."

Following the Company's announcement that it was changing the administrator of its medical plan to Aetna, several employees learned that their physicians were not in the Aetna network and complained about this to Human Resources Manager Carletta Chamberlain. Chamberlain communicated these concerns to Company headquarters in Wisconsin. The Company took no action to recruit physicians into the Aetna network. As early as September 22, the Company advised employees that it was their responsibility to recruit their physicians into the Aetna network. By e-mail dated December 1, in a response to one of Chamberlain's e-mails, Director of Corporate Benefits Paul Prickett reiterated that "we encourage employees to ask their providers to join whatever network we contract with."

This issue exploded in January 2001 when employees who had previously been unaware of the significance of the change in administrators discovered that their physicians were not in the Aetna network and that they would, therefore, be required to make copayments of 30 percent to their non-Aetna physicians. At Chamberlain's urging, Prickett came to the facility and addressed the Elizabethton employees on January 24. The meeting became heated. Employee Taylor testified that, "[w]hen Prickett was there it was our problem." Employee Herb Smith recalled that Prickett stated that the employees should contact their physicians and "appeal to their sense of loyalty" in order to have them join the Aetna network. Employee Franklin Coleman recalled that Prickett was not helpful, that he stated "we were just going to have to live with it." Vice President Bill Wythe was present at this meeting. Although Chamberlain testified that Wythe "clearly saw a problem," he made no commitment to do anything, and he did not contradict any statement made by Prickett.

The last response to employee concerns prior to January 30 is in e-mail correspondence from Prickett on January 26 at 3:12 p.m. In that document, Prickett informed Chamberlain that he and Paula Swafford of his office "will be working together with Aetna to pursue resolution of all the issues discussed during our meetings. We have a conference call tentatively scheduled for Monday to begin working through those issues." The e-mail requested that Chamberlain send her notes of the meeting, and she did so at 4:34 p.m. Prickett's message concludes with the statement that he would "ask them [Aetna] to have their provider relations people get in contact with some of those [physicians] who have dropped [out of the Aetna network]."

On January 30, in a memorandum to all employees, Plant Manager Oldenberg informed the employees that "Carletta [Chamberlain] and Sherry [Leonard] have placed some calls to doctors …," and that he "personally spoke with the Chairman of the State of Franklin Physician's Group." The memorandum concludes as follows:

> As I mentioned to you in our meetings two weeks ago, I feel we can work together to improve this situation.
>
> It is my understanding that some of you are seeking representation from a third party. Again, I ask that you give this serious thought and ask you to not sign authorization cards if asked to.

On February 2, the Company distributed an undated memorandum from Oldenberg and Chamberlain that advised that the Company "is committed to resolving the problems you are experiencing with your health care coverage." The memorandum states that "we will be working . . . with your doctors to resolve these problems." The memorandum then sets out other actions the Company would be taking while working with the health providers, including processing claims if the employee's physician refused to and making monetary payments to employees. The memorandum states a commitment by the Company, for the next 120 days, to "advance you funds and allow you to repay us once you have been reimbursed by Aetna" if a provider demanded up-front payment and a commitment to "[p]rovide for 90% coverage for those providers out of network under the Aetna plan parameters . . . ." These benefits were reconfirmed to employees in a more detailed memorandum distributed on February 6.

Michael Bryant, President of the UAW Local Union that represents hourly employees at the Snap-On plant in Johnson

City, Tennessee, a city located 10 miles from Elizabethton, testified that employees at that location were experiencing the same problem regarding non-Aetna network health providers. He met with Prickett and Wythe, apparently on January 24, and asked that the Company take action to have physician groups join the Aetna network. Bryant testified that two large physician groups, which also served Elizabethton employees, did, thereafter, become network providers. Employees at Johnson City were not offered or granted the 120 days of financial assistance announced at Elizabethton on February 2.

Chamberlain testified that, after Prickett's visit, there was discussion regarding providing to employees "what we had promised them." She identified herself, Oldenberg, Prickett, Vice President of Human Resources Sharon Brady, and Fred Hay, whose position was not identified, as being involved in development of the reimbursement plan. Of those five individuals, only Chamberlain and Oldenberg testified, and neither of them addressed the substance of the discussion regarding implementing a reimbursement plan. Although testifying that this occurred after Prickett's visit, there are no notes or e-mails establishing the dates of any such discussions, the substance of those discussions, or the approval of the reimbursement plan.

The Respondent contends, in its brief, that it had a "remedial program" in place before any union activity. Prickett's comments to employees on January 24 and his e-mail to Chamberlain on January 26 belie any such contention. Insofar as Chamberlain's testimony that discussion relating to reimbursement began in January be construed as implying that it began before January 30, I do not credit it. Prior to obtaining knowledge of employee union activity, there is not one iota of evidence that the Respondent had, or intended to implement, a "remedial program" of any sort. The last document before January 30 reflecting any intent to do anything is the e-mail of January 26 from Prickett to Chamberlain in which he informed her that he had a conference call tentatively set with Aetna for Monday, which would have been January 29, in which he intended to ask Aetna "to have their provider relations people get in contact" with physicians who had dropped out of the Aetna network. There is no mention of any intention by Snap-On to use its own managers to recruit physicians. There is no mention of any planned meeting regarding a reimbursement plan. Oldenberg's memo of January 30, distributed shortly after the Respondent learned of organizational activity, refers only to action by local management to recruit providers into the Aetna network. It makes no mention of expending Company funds to reimburse employees adversely affected by the change to Aetna.

Although Chamberlain testified to wanting to provide "what we had promised," the employees were receiving exactly what they had been promised, a $15 copayment to network providers and 30 percent copayment to nonnetwork providers. On January 24, prior to the Respondent learning of their union activity, the absence of providers in the network was the employees' problem. Prickett told them that they "were just going to have to live with it."

The undated memorandum from Oldenberg and Chamberlain, that was distributed to employees on February 2, addresses the employees' financial concerns for the first time. It advises that the Respondent would advance funds if the provider demanded payment up front, and would provide 90 percent, instead of 70 percent, of the cost of non-Aetna network physicians for 120 days. The details regarding the implementation of this hastily conceived benefit were not distributed until February 6. There is no evidence of the discussions regarding granting this benefit. Neither Brady nor Prickett, the corporate officials that Chamberlain identified as being involved in the development of this reimbursement plan, testified.

The Supreme Court has long recognized the inherent coercion in "conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

The record is devoid of any evidence regarding the substance of discussions that led to the decision to assist employees financially. This record compels the conclusion that the employees' organizational activity was the basis for that decision. This conclusion is confirmed by the absence of any commitment to do anything but talk with Aetna as of January 26, the absence of any mention of financial assistance when Oldenberg advised employees that local management officials had begun contacting health providers while contemporaneously requesting employees not sign union authorization cards, and the failure of Snap-On to provide the same financial relief to the employees of its Johnson City facility where employees were already represented by the UAW.

I find, as alleged in the complaint, that the Respondent granted benefits, specifically the solicitation by management officials to have physicians join the Aetna network, advancement of funds if a physician demanded up-front payment, and reimbursement at 90 percent of the cost of nonnetwork physicians, in an effort to discourage its employees from supporting the Union in violation of Section 8(a)(1) of the Act.

The complaint alleges three other actions listed in the Respondent's February 2 memorandum as constituting a grant of benefits: sending letters to nonnetwork providers assuring them of payment, processing claims for employees whose physicians refused to do so, and reimbursement of $15 for ophthalmologist examinations. The memorandum refers to the $15 contribution as having been announced previously and, although there is no evidence regarding when it was announced, there is no evidence that it had not been announced prior to the employees' organizational activity. There is no evidence that the assurance of payment and commitment to process claims either were matters of concern to employees or were not purely ministerial actions. The General Counsel's brief does not address any of these three actions. In the absence of evidence that these three actions constituted the granting of a benefit after the Respondent learned of the employees' union activity, I shall recommend that the complaint be dismissed in that regard.

3. Announcement of benefits for retirees

On January 31, employee Warren Taylor and several other employees advised Human Resources Manager Chamberlain that employees were organizing on behalf of the Union. They identified several of their concerns, including unjust writeups, retiree benefits, and health insurance. Early in the organiza-

tional campaign the Union distributed a leaflet regarding retiree benefits, quoting from two retirees, one who received a monthly benefit of $316 from Snap-On but who had to pay Snap-On $319 for his medical insurance.

One week before the election, in response to an employee question regarding retiree benefits, Oldenberg stated that he "shouldn't say anything about it now, but . . . we're looking at a program now that would offer lower premiums." Employee Herb Smith recalled Oldenberg stating that there was "[g]ood news that he would probably be giving us real soon coming from corporate pertaining to the retiree health care." I do not credit Oldenberg's testimony that he said nothing and that Chamberlain read to employees an internal memorandum dated March 19. Chamberlain did not testify to any such reading and was not called as a rebuttal witness.

The record contains two memoranda that are virtually identical. One of the memoranda is dated March 19, two days before the election, and identifies the author, Sharon Brady, as "Corporate Vice President Human Resources." The other is dated April 2 and does not state Brady's position. Both are directed to "Facility Management" and state that, beginning in 2002, the Company will offer an opportunity to elect an alternative plan providing for lower medical premium contributions but higher out of pocket costs. The text of both memoranda is identical, including the final sentence that states, "Feel free to share this with your employees."

Notwithstanding this sentence, Chamberlain initially testified that, after receipt of the March 19 memorandum, she spoke with Brady who informed her that she "preferred that we wait until she had further information" before sharing the content of the letter. In later testimony, Chamberlain changed her testimony, testifying Brady gave approval for Oldenberg to share the contents of the memorandum with employees, but "asked that it not be posted until the letter that would actually go to retirees was actually prepared and sent out to them." Thereafter, according to Chamberlain, Brady sent the April 2 memorandum "for posting." No rationale for not simply giving permission to post the March 19 memorandum was stated.

Although Corporate Director of Human Resources Tony Patanella credibly testified that retiree benefits had been under discussion for several months, whatever changes were contemplated regarding retiree benefits were not anticipated to occur until 2002. The Union had raised this issue at the beginning of its campaign. The Respondent's argument that retiree benefits are not a mandatory subject of bargaining ignores the fact that they can be a permissive subject of bargaining and that they were a campaign issue. See *Gordonsville Industries, Inc.*, 252 NLRB 563, 577 (1980).

The complaint alleges that the Respondent's announcement of this benefit violated Section 8(a)(1) of the Act. In *Arrow Elastic Corporation*, 230 NLRB 110 (1977), the administrative law judge reasoned that, when evaluating the propriety of an announcement of benefits, that the burden should be upon the Employer "to show that its announcement was reasonably timed as a sequential step in, and a byproduct of, a chronology of conception, refinement, preparation and adoption so as to lead one reasonably to conclude that the announcement would have been forthcoming at the time made even if there were no union campaign." Id. at 113. See also *Gordonsville Industries, Inc.*, supra at 577 fn. 22.

In the instant case the Respondent presented no evidence whatsoever justifying the timing of its announcement two days before the election of a change that was not going to occur until some 9 months in the future. Indeed, the employees at Elizabethton, where the Union had raised the issue of retiree benefits, learned of this benefit even before the beneficiaries, the retirees, had received a letter advising them of the forthcoming change. Counsel for the General Counsel argues that Oldenberg was correct when he noted that he should not have responded. I agree. The Respondent announced a contemplated future change in retiree benefits at the 11th hour before the election in order to discourage employees from supporting the Union. In so doing, it violated Section 8(a)(1) of the Act.

4. Predictions of violence

The complaint alleges that the Respondent created the impression that employee union activities would inevitably lead to strike violence. The General Counsel's evidence concerning this allegation comes from a booklet entitled "It's Time to Vote No" distributed by the Company to all employees within the week prior to the election and prior to March 19. The booklet, in referring to the right of employees to cross a picket line, tells the employees that they should not be "'too quick to ignore the reality of how difficult crossing the picket line might be." It continues with the following statement:

> Indeed, one Union supporter at Snap-on who claims to have been a UAW member for 17 years in Detroit recently spoke of using a high-powered rifle to shoot anyone who crossed the picket line as well as a Judge!"

The foregoing example resulted from a report by Security Guard Polly Grindstaff of an alleged conversation that she had with employee Harold "Hydro" Sheppard. Grindstaff describes the conversation as a "cuss fight." Sheppard denies that any conversation occurred.

According to Grindstaff, in the course of a conversation with Sheppard, she told him that the employees did not need a Union, "that a union was no good in the state of Tennessee that [it] had the Right To Work Law." She continued by pointing out that, if there were a union and the employees chose to strike, "there would be fifteen hundred people lined up at the front gate wanting a job." Grindstaff states that Sheppard responded saying, “Not if somebody was over there in that field with a high-powered rifle and shot the first son of a bitch that crossed the line, and then went down there and shot the Judge that issued the order." Grindstaff reported this alleged conversation to Chamberlain who had her reduce it to writing. In the written statement, Grindstaff reports that Sheppard stated:

> Someone should be over in the field with a high-powered rifle & shoot everyone who comes through the gate, starting with the judge who wouldn't let them stop people from crossing a picket line.

Sheppard, who had worked at Chrysler in Michigan, denied having the conversation that Grindstaff recounted. He did acknowledge that, in conversation with other employees, he had related an incident that he had been told about by his father-in-

law involving a United Mine Workers strike in which people got shot and a judge was injured.

The Respondent did not contact Sheppard to confirm the accuracy of the report it received from Grindstaff. The statement Grindstaff attributed to Sheppard contains no assertion that he would take any violent action.

Sheppard had undergone surgery and was not working when the Company's publication was distributed. When it was brought to his attention, Sheppard was upset. He explained that he was "the only one who had worked at Chrysler." He was concerned that he had not made the statement being attributed to him, and he wanted the Company to retract it because he would be blamed for anything that happened. Sheppard came to the gate where prounion employees, including Taylor and John Large were handbilling and informed them that he wanted to get the statement retracted. Sheppard, accompanied by Taylor, went to the plant where they spoke with Plant Manager Oldenberg. Large followed and joined them. Sheppard explained that, because of the reference to 17 years of UAW membership, everybody knew that the statement referred to him and that "it would put my life in danger if something did happen." He denied making the statement contained in the Company's booklet, "I . . . made no [allegation] that way." Corporate Director of Human Resources Patanella came out of an adjacent office and joined the conversation. He read the statement and informed Sheppard that "there were no names mentioned and they [were] not going to retract it." I do not credit Oldenberg's testimony that he does not recall Sheppard's request for retraction.

I need not decide whether there was a conversation between Sheppard and Grindstaff since the Company accepted Grindstaff's account and made no effort to contact Sheppard to confirm her report. Grindstaff's account is the only report that the Company had regarding Sheppard's purported statement, and that account states clearly that the reference was to "someone" being in a field. Sheppard, who does not own a gun, never, as Grindstaff admitted, made any statement even remotely suggesting that he would shoot anyone. Despite this, the Company published a statement that a current employee who had been a member of the UAW for 17 year, an unmistakable reference to Sheppard, "*recently spoke of using* a high-powered rifle to shoot anyone who crossed the picket line." [Emphasis added.]

The Respondent's false attribution of potential violence by Sheppard did not threaten violence by the Respondent. The statement referred to violence "not by it [the Respondent] but by prounion supporters, i.e. conduct beyond its control." *Hampton Inn*, 309 NLRB 942, 943 (1992). I shall, therefore, recommend that this allegation of violation of Section 8(a)(1) of the Act be dismissed. It shall, however, be considered as objectionable conduct.

5. David Markland

David Markland was a known prounion employee. He wore a union shirt for a short period of time but found it uncomfortably warm and then began wearing buttons identifying him as a supporter of the Union. No management official who testified denied knowing that Markland supported the Union.

On May 16, employee Wanda Burrow came to Markland's workstation with a routing paper for a specific order of wrenches and asked if he could process the order that day. Markland replied that he could if he got the wrenches. Burrow recalls Markland looking into a tub for the wrenches at the point. Burrow left the routing paper with him. When he looked at the routing paper, Markland discovered that there was no tub number or storage location written on it. Markland went to the Dispatch Office, a cubical with a sliding glass window where orders are exchanged. Upon coming to the window, he observed Burrow, Betty McFarland, and David Shouse in the office. He slid the window open. When he did this, Burrow approached the window. Markland held up the routing slip and told her that "there was no storage number or tub number on the paper to tell me where these wrenches were." Burrow recalls him stating that the order was "not out there." Neither McFarland nor Shouse were paying any attention to the conversation, and they were not facing the window.

At that point, according to Markland, Burrow "reached through the window and slapped me on the . . . left hand side of my cheek" with her right hand. Markland testified that the slap "stung," and that he "was shocked." He stepped back and asked Burrow " why she did it," that he "did not deserve that" He laid the routing slip down and walked away. Burrow followed him and sought to apologize, but Markland told her that he was too upset, that it would be better "for us not to be around each other."

Burrow's account of the incident, although differing is some respects, is not significantly different. She recalls stating that she thought Markland had told her that the order was out there and that he replied by asking, "[D]id you think the tub that I had my head stuck in was the order?" Although denying slapping Markland, Burrow admits that she "reached through the window and patted his face," while telling him that she would find the order. Markland reacted stating, that she "should not have done that." Burrow attempted to touch Markland again, to "take it back," but he turned away, laid down the routing paper, and left. Burrow acknowledges that Markland looked "kind of agitated." She found the order and went to Markland. She began a conversation asking, "I have offended you, haven't I?" Markland responded that he did not like being hit by a woman, moved to his desk, and sat down, not looking at Burrow. Burrow continued stating, "I'm sorry, I apologize, I did not mean to offend you. I was only clowning around." She testified that Markland responded that "you cannot be clowning around with this Union thing going on." Markland did not testify that the Union was mentioned at any time and no other witness testified to any mention of the Union.

Burrow, although not in the unit, had expressed her opposition to the Union. Her husband, who was in the unit, wore "Vote No" badges.

Markland reported the incident to his supervisor, Tony Irick, and requested an appointment with Human Resources Manager Chamberlain. He informed Irick that he was too upset to work and wanted a gate pass to go home. Irick left and sometime later returned with the gate pass and told Markland to stop by and speak with Chamberlain and Larry Cooper, a former General Supervisor at the Elizabethton plant. Markland did so. He told them that Burrow "had slapped me, and that I felt like I didn't deserve it. I had did nothing to provoke it, and it was an

emotional shock to me, and that I was going home." Chamberlain and Cooper remarked that they did not see any marks on Markland's face, but informed him that they would investigate. They asked if there was anyone else present, any witnesses. Markland informed them that McFarland and Shouse had been present, but he did not know if they had observed the incident. At this point, it had been over an hour since the incident occurred. Markland did not request that any specific action be taken against Burrow, stating, "That's up to you guys."

Markland went home. Later that day, he swore out a warrant against Burrow for assault. He then withdrew the warrant upon the advice of counsel. I find the taking out of the warrant, its withdrawal, and the sending by the Company of its attorney to the courthouse on the day this matter was scheduled to be litigated to be immaterial to any issue before me.

Following Markland's complaint, Chamberlain interviewed Burrow who reported that Markland "must have been mad because he pitched the packet through the window," an allegation unsupported by McFarland and Shouse. Neither McFarland nor Shouse reported any physical contact upon Markland, but Burrow admitted that she "had playfully tapped him on the cheek." On cross-examination, Chamberlain admitted that Burrow was "hysterical, . . . very distraught, very upset," and that, in the interview, Burrow "wasn't making perfect sense."

The following day, May 17, Markland spoke with Chamberlain and Cooper who told him that they felt that he was "blowing things out of proportion," that he had not been slapped, that they had seen no signs of physical contact, that he was "creating a hostile work environment for Burrow by talking about this on the floor with other people, and that as far as they were concerned the matter was closed." Markland, at the hearing, acknowledged that rumor of the incident had begun to circulate, that several people asked him about it, and that he responded he "got slapped and that was it."

Following this meeting, it is unclear whether it was later on May 17 or on May 18, Markland spoke with Plant Manager Oldenberg. Oldenberg came to Markland's workstation and apologized, stating that he could not speak for Burrow, but that on behalf of the Company, he was sorry the incident happened. According to Markland, Oldenberg continued, stating that Burrow "had a reputation and that he had seen her kind of slap around and hit on people as a gesture of expression." He demonstrated by patting Markland's shoulder. Markland replied, "No, it wasn't like that." Markland, who kept a notebook, made a note of what Oldenberg said.

Markland returned to Chamberlain and Cooper on May 18 and told them that Oldenberg had said that he had seen Burrow slap and hit people. He informed them that he made notes of this conversation and presented his notebook, which bore a UAW logo, but neither Chamberlain nor Cooper looked at it. They asked Oldenberg to join them. He denied stating that he had told Markland that he had seen Burrow slap and hit people, that Markland was misquoting him, that he had said he had seen her "touch people." Markland did not recant his account of what Oldenberg had told him, stating to Oldenberg that he "knew that wasn't so." Markland was again told that he was blowing things out of proportion, to "drop it and let it go," and to not talk to anyone on the floor about the incident, that he was creating a hostile environment on the floor.

On May 22, Markland was called to the office. Markland requested that he be permitted to have a witness, and employee Herb Smith joined them. Markland was presented a final written warning for the major offense of "[g]iving false replies or testimony to the company in any matter relating to company activities, business affairs, and like matters." The warning sets out the chronology of Markland's complaint and refers to his statement that Oldenberg had told him the he had seen Burrow "hit people" whereas Oldenberg asserted that he had seen Burrow "pat" and had "patted you on the shoulder to demonstrate." The warning states that Markland had responded that Oldenberg was not being truthful. It notes that Markland had made "notes of the alleged conversation," and then states that Markland "[i]n effect . . . called the plant manager a lair." It concludes by referring to Markland's "unfounded allegations" against Burrow, that his falsely accusing Oldenberg "casts great doubt upon the accuracy of the allegations" against Burrow.

At the hearing, Oldenberg acknowledged that there was a difference between disagreeing with another person's recollection of an event and calling a person a liar, but he asserted that Markland did call him a liar. Markland denied doing so. I have no doubt that, if Markland had actually called Oldenberg a liar, the warning would have so stated. I credit Markland. The warning states that Markland "in effect" called the Plant Manager a liar.

When Markland was issued the warning both he and Smith were directed not to speak about the incident with employees.

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that Markland engaged in union activity and that the Respondent was aware of that activity. Antiunion animus is established. The warning to Markland was an adverse action. The General Counsel established a prima facie case and it was incumbent upon the Respondent to demonstrate that it would have taken the same action in the absence of Markland's union activity.

Although Chamberlain testified that she viewed the incident as a "she said, he said" situation, the Respondent ignored what she, Burrow, said and characterized what he, Markland, said as false. Burrow had admitted a nonconsensual touching, whether it be described as a pat or a tap. Rather than take any formal action against antiunion employee Burrow for her admitted tapping or patting of Markland, the Respondent challenged his characterization of the contact as a slap, told him that he was blowing things out of proportion, and directed him to drop it since he was creating a hostile work environment for antiunion employee Burrow.

Markland, having had his veracity questioned, returned to Chamberlain and Cooper after Oldenberg had corroborated that Burrow would "kind of slap around and hit on people as a gesture of expression." Although Oldenberg denied making the remarks attributed to him, Markland did not recant his straightforward report of what Oldenberg had said, again offering his notes for confirmation. Chamberlain and Cooper did not even look at the notes. The Respondent repeated its admonition that Markland "drop it and let it go" and directed that Markland not

talk to anyone on the floor about the incident. In so doing the Respondent reconfirmed that it was not concerned about the complaint of prounion employee Markland but was concerned about the effect of the incident upon antiunion employee Burrow.

There is no evidence that Markland violated the Respondent's admonition to drop the matter and cease talking about it. He was never advised that he risked discipline by persisting in asserting, in a closed door meeting with management, that Oldenberg had made comments that Oldenberg was now denying. The Respondent presented no evidence relating to its decision to issue a final warning to Markland on May 22, four days after the meeting of May 18.

The Respondent's policy on harassment prohibits, inter alia, "[h]itting, pushing, or other aggressive physical contact," and provides that "[i]ntimidating, coercing, threatening, taking reprisal or discrimination against any employee for complaining about harassment . . . is prohibited."

The Respondent also has an open door policy. If that policy is to be effective, employees must be accorded the right to state their recollection of events and statements, even when their recollection differs from that of a superior, without fear of discipline. Management may well discredit the employee and, in instances such as insubordination or failure to carry out a supervisor's direction, discipline the employee for that offense. By characterizing disagreement regarding an employee's recollection of words spoken as making a dishonest false statement, the Respondent sabotages its own procedures. Oldenberg's acknowledgement that honest disagreement does not constitute calling another a liar is consistent with the foregoing analysis. Oldenberg could recall no other occasion upon which an employee had been warned for disputing what a superior had said.

Markland was purportedly warned for "[g]iving false replies or testimony to the company in any matter relating to company activities, business affair, and like matters." Markland's complaint did not relate to company activities, business affairs, or like matters. It related to the conduct of another employee. Even though it is uncontraverted that the other employee had tapped or patted Markland on his cheek without his consent, the Respondent, whose antiunion animus is amply established on this record, focused upon having Markland drop the matter so as not to create a hostile work environment for antiunion employee Burrow. When Markland sought to support his allegation, and stood by his account of what Plant Manager Oldenberg had said, he was issued a final warning for "in effect" calling the Plant Manager a liar. There is no evidence that any other employee has ever been disciplined for disputing what a superior had said.

In view of the foregoing, and the entire record, I find that Markland's union activity was a substantial and motivating factor in the Respondent's unexplained decision to discipline Markland four days after he disputed Plant Manager Oldenberg's recollection of the conversation in which they had engaged on May 17 or 18. The Respondent has not established that it would have taken the same action against Markland in the absence of his Union activity. Consistent with the complaint allegation, I find that the Respondent, by issuing a final warning to Markland on May 22 because of his union activity, violated Section 8(a)(3) of the Act.

The complaint alleges that the Respondent's direction to Markland on May 18 and 22, and to Smith on May 22, not to discuss the "altercation," unlawfully prevented them from engaging in protected concerted activity. Markland made an individual complaint regarding the misconduct of another employee. He did not seek to enlist the assistance of any other employee regarding his individual complaint. Neither Markland nor Smith were directed not to discuss the action of the Respondent, which, insofar as it resulted in discipline to the employee who made the complaint but no discipline against the other employee, was a matter relating to terms and conditions of employment. The complaint allegation is limited to the restriction of conversation regarding the "altercation." The altercation related to an incident between two employees. The Respondent did not direct, and the complaint does not allege, that employees were prohibited from discussing the manner in which the Respondent had acted, actions that did indeed affect their terms and conditions of employment. I shall recommend that the allegations relating to discussion of the altercation be dismissed.

C. Objections to the Election

The Petitioner's Objections 1 and 2 relate to the activities of employee David "Red" Shouse. Shouse was present at the initial preelection conference, purportedly as a potential alternate observer, but he never served as an observer. Shouse did not perform his regular job on the morning of the day of the election. During the first voting session, from 6 to 8 a.m. on March 21, Shouse was present in the vicinity of the nurse's station in a position from which he observed employees as they returned to the plant after they left the voting place. There is a glass display case of various articles bearing the Snap-On name and logo in this area.

Objection 1 alleges the creation of the impression of making a record of employee voting activity. After employee Robert Blevins left the voting place, he passed by the open area adjacent to the nurse's station. He heard his name spoken by Shouse. Shouse was standing next to an unidentified male individual, identified at the hearing as attorney Christopher Owens, who was sitting. Employee Bobby Hampton, as he was returning to the plant after voting, noticed Shouse, Owens, and Sherry Leonard, the plant nurse, sitting in the nurse's station. It appeared to Hampton that Shouse was "watching" employees as they passed by after exiting the voting place. He did not hear him say anything. Hampton called International Representative Hendrix and told him that "we had somebody we thought was counting votes." Employee Timothy Timbs observed four people after he left the voting place: Shouse, Owens, Leonard, and Sandra Forbes, the plant receptionist. Shouse was sitting behind the display case. Timbs testified that Shouse looked at Timbs and "went back like he was writing something." Timbs acknowledged that he "could not see" what Shouse was actually doing. Employee David Markland observed Shouse standing just inside the door of the nurse's station next to nurse Leonard, who was sitting. He did not hear Shouse or Leonard say anything. I do not credit Markland's mistaken testimony that he

was able to observe Shouse before he entered the voting place. Employee Roy Ward exited the voting place shortly after employee Randy Canter. Ward heard Shouse speak Canter's name and say the word "no." Canter turned to approach Shouse who, with a hand gesture, indicated that Canter should leave and he did so. Shouse was standing next to nurse Leonard, who was seated. As Ward passed, he believed he heard Shouse state his name and the word "yes." He noted that "it looked like . . . they were marking something" and that he did not think it was "a Christmas list." Although Ward did not mention speaking with Hampton after this, testimony by Hampton on rebuttal suggests that they conferred prior to Hampton's call to Hendrix reporting the presence of Shouse. Neither Shouse, Owens, Leonard, nor Forbes testified.

The Petitioner couches its argument in terms of surveillance. I find that the evidence establishes a clear case of list keeping, a practice condemned by the Board for more than half a century. See *Days Inn Management Co.*, 299 NLRB 735, 736 (1990) and cases cited therein. I am mindful that no employee who observed Shouse or heard his name being spoken saw a list, but the keeping of a list can be inferred. In *A. D. Julliard and Co.*, 110 NLRB 2197, 2199 (1954) the Board acknowledged that it "could be inferred from the circumstances, that the employees knew that their names were being recorded by the Employer." The Employer presented no evidence explaining Shouse's speaking the names of employees who had voted in the presence of the Employer's attorney as those employees returned to the plant. I agree with employee Ward that the Employer was not marking "a Christmas list." The Employer argues that there is no evidence of purported improper conduct prior to the time that any employee voted. The Board, in *Piggly-Wiggly*, 168 NLRB 792 (1967), specifically stated that is its policy, in the interest of free elections, to prohibit "the keeping of any list, apart from the official voting list, of persons *who have voted* in a Board election." Ibid, emphasis added. The failure of the Employer to present Shouse, Owens, or Leonard as witnesses regarding the stating of names and appearing to write confirms the inference that they were doing exactly what the testimony suggests they were doing, making a list. It is immaterial that the list was made after employees had voted. List keeping is objectionable conduct. The Objection is framed with regard to the conduct of Shouse. Insofar as it is undisputed that Shouse was present with Owens at various times, I find that Shouse was acting as an agent of the Employer and his conduct is attributable to the Employer. This aspect of Objection 1 is sustained.

I do not find the assignment of Shouse to duties other than his normal duties constitutes objectionable conduct. The Employer is free to assign its employees to various duties. Although I have found the duties to which Shouse was assigned were objectionable, I recommend the aspect of Objection 1 relating to his assignment to duties other than his normal job duties be dismissed.

Objection 2 relates to the entry of Shouse into the voting place with a disabled employee. International Representative Hendrix and employee John Large, a Union Observer, both testified that, at the end of the preelection conference prior to the first voting session, there was a short conversation with the Board Agent regarding disabled employees, and it was agreed that such employees would be assisted by family members. Corporate Director of Human Resources Tony Patanella, the Employer's representative at the preelection conference, recalls that it was only agreed that no member of management could assist a disabled employee. Disabled employee Steve Blevins arrived at the plant, assisted by his wife Cathy Jean Blevins. As Mrs. Blevins came through the door of the plant, she observed a redheaded employee, who I find to be Shouse. Shouse was coming out of the restroom. Mrs. Blevins requested him to assist her in case her husband started to fall. They entered the voting place and assisted Mr. Blevins to the voting booth. Mrs. Blevins continued to steady her husband by holding onto his arms. The curtain was closed. Shouse was outside the booth and was not touching Mr. Blevins. Mrs. Blevins turned her head. After marking his ballot, Mr. Blevins placed his ballot into a challenge envelope and then dropped his challenged ballot into the ballot box. Shouse and Mrs. Blevins assisted Mr. Blevins out of the voting place. No protest was made to the Board Agent. Union Observer Large reported what had occurred to Hendrix after the first voting session. Notwithstanding any agreement that had or had not been made, Mrs. Blevins, the only family member present, requested assistance. There is no evidence that Shouse engaged in any electioneering. I recommend that this Objection 2 be dismissed.

Objection 3 alleges unlawful interrogation, an allegation made in the initial charge but not alleged in the complaint. The Petitioner cites two instances of alleged interrogation, the first involving employee Warren Taylor on January 31 immediately after Taylor and several other employees told Human Resources Manager Chamberlain that they were organizing on behalf of the Union. This was prior to the filing of the petition. The second instance cited by the Petitioner occurred approximately two weeks before the election when prounion employee Herb Smith was engaged in a conversation with Supervisor Tony Church. General Supervisor Larry Cooper joined them and asked Smith why he was thinking about supporting the Union. Smith replied that he was "tired of the crap that was going on in the plant," noting specifically that seniority was not being adhered to, the retirement program was inadequate and the health insurance issues. Cooper related his experience at Sioux Tools, a plant that had been unionized and had closed. Smith asserted that Cooper insinuated that the plant had closed because of the Union by referring to various problems "that he felt ultimately contributed to the closing of that plant," but he acknowledged that Cooper did not state that Sioux Tools closed because of the Union. Smith testified that Cooper also asked whether he would vote to go on strike "knowing that someone would lose their house." Smith replied that no one was going to lose their house and that, if he "felt the need to vote to strike" he would do so. The strike question was posed as a hypothetical and Smith, an intelligent and articulate prounion employee, negated the basis for the hypothetical when he responded that no one was going to lose their house. Under prevailing case law, this exchange on the plant floor that contained no threat was not coercive. *Rossmore House*, 269 NLRB 1176 (1984). It is not alleged as a Section 8(a)(1) violation, and it was not fully litigated. Even if I were to find that this encounter constituted a single instance of objectionable conduct, I would find it to be

de minimis since it involved only one employee and there is no evidence that any other employee was aware of the conversation. I shall recommend that this objection be dismissed.

The Petitioner's Objection 4 alleges threats of the inevitability of strikes and strike violence. There is no complaint allegation relating to statements regarding the inevitability of strikes made in videos or at captive audience meetings. The Petitioner adduced evident that, on March 13, the Employer posted a memorandum entitled Employee Strike Costs that lists the year of the strike, the location of the Snap-On facility at which the strike occurred, the duration of the strike and the cost to employees. The last entry on the document lists Elizabethton as follows:

2001	Elizabethton	1 week	$936.00

The memorandum was posted throughout the plant. Several hours after being posted, the Employer's supervisors began removing the memorandum. Chamberlain testified that the memorandum was removed because of an inaccuracy regarding the loss figure. When reposted, the memorandum omitted the duration of any potential strike at the Elizabethton facility. The revised memorandum includes Elizabethton as follows:

2001	Elizabethton	$842.00

Telling employees that they must strike in order to obtain a collective-bargaining agreement violates the Act. As explained in *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992), citing *Devon Gables Lodge & Apartments*, 237 NLRB 775 (1978), at 776:

> The speakers stated flatly, without qualification, that, if the Union won, a strike would occur. The logical inference from these statements is that no matter how negotiations progressed and no matter what the Union sought from Respondent the employees would nevertheless have to strike to obtain a contract. It is clear that the statements about the inevitability of strike contained a threat that the Respondent would refuse to bargain in good faith in order to insure a strike.

The Employer's memorandum of March 13 predicated a strike of a least 1 week at Elizabethton. Although there is no evidence disputing Chamberlain's testimony that the initial monetary figure was incorrect, the absence of the purported duration of a strike in the second document establishes that the Employer either realized or was advised that the first document, without qualification, promised that, if the Union won, a 1-week strike would occur. The replacement, omitting the length of the strike, did not disavow the threat. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). By predicting, without qualification, that if the employees selected the Union as their collective-bargaining representative there would be a 1-week strike at Elizabethton, the Employer interfered with the employees exercise of their Section 7 rights and engaged in objectionable conduct. This portion of Objection 4 is sustained.

The second aspect of this objection relates to strike violence. I have already found that the Employer's publication of the statement that a current employee "*recently spoke of using* a high-powered rifle to shoot any who crossed the picket line" was erroneous. The basis for the publication, a statement that Grindstaff attributed to employee Sheppard, did not assert that he would engage in violence. In *Home & Industrial Disposal Service*, 266 NLRB 100 (1983), the Board overruled the portion of *Hickory Springs Mfg. Co.*, 239 NLRB 641 (1978) that had held that predictions of future violence did not constitute objectionable conduct. The Board quoted with approval the language of the Court of Appeals for the Fifth Circuit that had rejected the Board's position:

> Men judge what others will do on given occasions by their prior actions and, less reliably, doubtless, by their statements about their intended future actions. So they assess what kind of folk they are dealing with and how those folk are likely to react if crossed. Even the implicit threat of a club or pistol on the hip, without more, may be sufficient to influence significantly the conduct of those who are cast in company with the bearer. In short, we reject the view that such pervasive threats of violence as these can be said, in effect as a matter of law, not to have created a coercive atmosphere sufficient to contaminate the election because they were merely conditional ones.
>
> 645 F.2d 506, 510 (5th Cir. 1981).

The Board then stated:

> Consistent with the position taken by the circuit court, we believe it unrealistic to conclude that a union agent's threats of bodily harm, damage to personal property, or the like, cannot, as a matter of law, impact on an election merely because the threat in question is couched in terms of possible future conduct. Such an approach does not take into account the tendency of such threats to have a substantial and destructive effect on free and open campaign discussion, as well as freedom of choice at the polling place itself. A campaign environment in which a union threatens that violent repercussions will ensue, should employees choose to oppose it in the future, is one in which there is substantial likelihood that employees will be inhibited from expressing their actual views, and is surely one which jeopardizes the integrity of the election process. Id at 101.

In the instant case, the Employer falsely attributed comments relating to violence to a current employee who specifically, but unsuccessfully, requested retraction. The Employer, by attributing a threat of strike violence to a current employee that its own document confirms was a false attribution, engaged in objectionable conduct. This aspect of Objection 4 is sustained

Objection 5 alleges the publication of threats of violence directed at its supervisors by nonemployee union members. In the booklet, "It's Time to Vote No," under the heading "Violence, UAW-Style," the Employer refers to two vulgar messages left on the Employer's Straight Talk Message Line by a drunken nonemployee union member. The booklet asserts that the nonemployee obtained Human Relation Manager Chamberlain's name and telephone number at an organizational meeting. There is no evidence of this. The booklet also asserts that the nonemployee claimed "to have done harm to Carletta [Chamberlain]'s son." There is no evidence of this. The drunken nonemployee alleges that he engaged in a homosexual act that

Chamberlain's son purportedly "liked."[4] The document does not point out that Chamberlain's son is an adult and resides in a state other than Tennessee. The entry concludes that this incident "opened the eyes of many Snap-On employees and made us all realize that having a Union here is a threat to our friendly atmosphere and good relationships. Just look what's happened to us already.!" Contrary to the wording of the objection, the report of the conduct of the nonemployee did not constitute a threat. Although the publication materially misrepresents the content of the vulgar telephone call, I do not find that it constitutes objectionable conduct, and I recommend that this objection be dismissed.

The Petitioner's Objection 6 was withdrawn.

Objection 7 alleges the solicitation of grievances and promise to remedy them, including employee health insurance benefits. The solicitation allegedly occurred on January 31, prior to the critical period, immediately after Taylor and several other employees told Chamberlain that they were organizing on behalf of the Union. In his initial testimony, Taylor testified, "I think that she even asked what our grievances were." On cross-examination, Taylor testified that "we volunteered the issues as a group" and that Chamberlain took notes. After listing their concerns, particularly with regard to the health insurance situation, Chamberlain stated, "I don't blame you." There is no probative evidence that Chamberlain solicited grievances.

The remainder of this Objection alleges that the Employer granted improvements in employee terms and conditions of employment including health insurance. I have found that the grant of benefits did violate the Act. Although announced on February 2, prior to the critical period, the first payment pursuant to the reimbursement policy was not made until February 16, well after February 7 when the representation petition was filed. The Petitioner, citing *Scott Glass Products*, 261 NLRB 906, (1982), argues that this action, occurring in the critical period, constituted objectionable conduct.

I disagree. The Board, in *Kokomo Tube Co.*, 280 NLRB 357 (1986) distinguished *Scott Glass*, and did not affirm the finding of the administrative law judge that the "grant and payment of the raise should properly be considered as a distinct violation." Rather, the Board held that, even though the benefit was not actually received until after the petition was filed, insofar as the benefit was effective prior to the filing of the petition, it did not constitute objectionable conduct. Id. at 358, fn. 8.

Consistent with the forgoing precedent, I find that the Employer's actual payment of benefits pursuant to its prepetition announcement did not constitute objectionable conduct, and, therefore, I recommend that this aspect of Objection 7 be dismissed.

Objection 7 relates to solicitation and the granting of benefits, "including" health insurance benefits. The Employer, contrary to my finding, argues that its announcement of retiree benefits did not violate the Act, and further argues that it was not encompassed in Objection 7. I need not engage in an extended analysis of whether the announcement is encompassed in Objection 7. Whether I consider it to be encompassed in Objection 7 is immaterial since this issue was alleged in the complaint, and it was fully litigated. Thus, there is no question that it is encompassed in Objection 13, the "catchall objection" relating to "these and other acts." *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988).

The Petitioner's Objection 8 alleges that the Employer looked disfavorably upon union supporters and thereby conveyed an implied threat of retaliation against them. There was no evidence adduced in support of this Objection, and I recommend that it be dismissed.

Objection 9 alleges the singling out of employee Taylor by posting a message on the Employer's electronic bulletin board advising that employees who wanted their union authorization cards returned should "see Warren Taylor." Taylor acknowledges that, at a captive audience meeting of third shift employees, Plant Manager Oldenberg made comments suggesting that several employees wanted their cards back. Taylor was aware that AN employee had requested that his card be returned, and it had been. He informed Oldenberg that if anybody wanted their card back that "we," referring to the employee Organizing Committee, would get their card back "if we could." He did not grant permission for the Employer to use his name on the electronic bulletin board and was not asked if the Employer could use his name. When he observed that his name was being used, he informed his supervisor that he "did not like that." Despite his protest, the message continued to run for "a week or so." Taylor was an outspoken advocate for the Union and assumed the position of spokesperson when responding to Oldenberg. The message did not demean Taylor in any manner. The Petitioner cites no case authority establishing that the foregoing constitutes objectionable conduct. I recommend that this objection be dismissed.

The Petitioner's Objection 10 alleges threats of specified and unspecified reprisals in retaliation against employees who exercised their right to engage in conduct protected by Section 7 of the Act. The Petitioner's brief does not separately allege any specific threat in support of this objection, arguing that it is proved by the videos shown at the captive audience meetings. No statement in the videos is alleged as violating the Act. There is no probative evidence supporting this objection and I recommend that it be dismissed.

Objection 11 relates to surveillance and is coextensive with the complaint allegation insofar as the conduct occurred during the critical period. I have found that the Employer's altering the normal method of which it utilized its surveillance camera in order to observe employee protected activity violated Section 8(a)(1) of the Act. Employee Warren Taylor's uncontradicted testimony establishes that handbilling occurred at the gate for two or three weeks after it began on January 29, thus placing it well within the critical period that commenced on February 7, less than a week and a half after the handbilling began. All employees entering the gate were subjected to this surveillance, thus this conduct was clearly not de minimis. See *Mercy General Hospital*, 334 NLRB 100, 108 This surveillance by the Employer constitutes objectionable conduct, thus Objection 11 is sustained.

[4] The Charging Party, in its brief, correctly notes that the tape played at the hearing was not properly transcribed. The transcript, at page 621, omits the words "and he liked it."

Objection 12 alleges that the Employer threatened that selection of the Union would be futile, that the Employer would intentionally prolong and delay bargaining and that contract negotiations would result in freezing employee wages and benefits. In arguing that it has proved this objection, Counsel for the Petitioner cites various statements in the videos shown at the captive audience meetings held by the Employer. No statements in the videos are alleged to violate the Act. Review of the transcripts of the videos reveals that they were carefully prepared and edited to convey the Employer's message. Statements such as UAW standing for "Unemployed Another Worker," an implied threat of job loss if uttered by a supervisor of the Employer, are made as statements of opinion by the former Director of Human Relations of a plant in southwestern Virginia that had closed. Cf. *Venture Industries Inc.*, 330 NLRB 1133 (2000). As such, they constituted campaign propaganda to which the Union could respond. There are no unlawful threats of futility, prolonged negotiations, or freezing of wages and benefits. I recommend that Objection 12 be dismissed.

Assuming that the Employer's announcement of retiree benefits shortly before the election is not encompassed within Objection 7, I find that it is encompassed within Objection 13, it violated Section 8(a)(1) of the Act, and it constituted objectionable conduct.

I have found that, after the petition was filed and prior to the election, the Respondent engaged in violations of Section 8(a)(1) of the Act by engaging in surveillance and announcing retiree benefits to employees. This conduct is encompassed in the Petitioner's Objections 11 and 13. Additionally, I have found that the Employer engaged in objectionable conduct by list keeping and threatening the inevitability of strikes and strike violence as alleged in Objections 1 and 4.

I find that the foregoing violations of the Act that occurred during the critical preelection period and correspond to the Petitioner's objections, together with objectionable conduct alleged in the Petitioner's Objection 1 and 4, interfered with the employees' free choice of representation and that that the election must be set aside and a new election held.

CONCLUSIONS OF LAW

1. By engaging in surveillance of employee union activities and by granting health care benefits and announcing retiree benefits in an effort to encourage employees to cease engaging in union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By issuing a final written warning to an employee because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily warned David Markland, it must rescind the warning and, within 3 days, notify him in writing that this has been done and that the warning will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Snap-On Tools, Inc., Elizabethton, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in surveillance of employee union activities protected by Section 7 of the National Labor Relations Act.

(b) Granting benefits to employees and or announcing retiree benefits to employees in an effort to discourage employees from supporting the Union.

(c) Warning or otherwise discriminating against any employee for supporting the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, or any other union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the discriminatory warning issued to David Markland on May 22, 2001, and within 3 days thereafter notify him in writing that this has been done and that the warning will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its facility in Elizabethton, Tennessee, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 30, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS ALSO ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election is set aside and Case 10–RC–15186 is severed from Cases 10–CA–33020 and 10–CA–33096 and remanded to the Regional Director to conduct a second election when he deems the circumstances permit a free choice.

Dated, Washington, D.C., April 22, 2002.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT engage in surveillance of your union activities, and WE WILL NOT grant or announce benefits to you in an effort to discourage you from engaging in union activities.

WE WILL NOT warn or otherwise discriminate against you because you support the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, or any other union.

WE WILL, within 14 days of the Board's Order, rescind the discriminatory warning issued to David Markland on May 22, 2001, and within 3 days thereafter notify him in writing that this has been done and that the warning will not be used against him in any way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.